IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 05.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.447 of 2000

Ramakanth .. Appellant/Complainant

vs.

V.A.Rahim .. Respondent/Accused

Prayer: This appeal has been preferred against the Judgment dated 06.09.1999, in S.T.R.No.113 of 1999 on the file of the Sub-Divisional Judicial Magistrate, Mahe.

For Appellant : Mr.C.Rajan

For Respondents : Mr.A.V.Ilango

JUDGMENT

This appeal has been preferred against the judgment in S.T.R.No.113 of 1999 on the file of the Sub-Divisional Judicial Magistrate, Mahe. The complainant is the appellant herein.

2. The short facts of the private complaint preferred under Section 200 of Cr.P.C, for the offence punishable under Section 138 and 142 of the Negotiable Instruments Act, are as follows:-

The accused borrowed a sum of Rs.50,000/-(Rupees Fifty Thousand only) from the complainant on 14.09.1998 at Mahe and in discharge of the said amount the accused issued a cheque for the amount dated 6.1.1999 bearing No.064083 drawn of Indian Bank, Tellicherry Branch. When the cheque was presented on 06.01.1999, the cheque was dishonored by the Indian Bank, Mahe, on account of insufficiency of fund in the account of the accused as per memo dated 8.1.1999. The complainant issued a legal notice on 13.1.1999 through his counsel giving 15 days time from the date of return of the cheque, calling upon him to pay the cheque amount and the accused received the notice on 14.01.1999. However he did not pay his debt and he did not send reply. The accused has committed an offence under Section 138 of the NI Act. The complaint was filed within one month from the expiry of 15 days grace period to pay the cheque amount. Hence, the complaint.

3. The complaint was taken on file by the learned Sub-Divisional Judicial Magistrate and after the accused appearing on sommons, copies

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under Section 207 of Cr.P.C were furnished and when the offence was explained to the accused he pleaded not guilty.

4. The complainant was examined as P.W.1. According to the complainant, he knows the accused for nearly two years since as a patient he took treatment under him and that later they became friends and on 14.9.1998 the accused borrowed a sum of Rs.50,000/- in cash at his residence at Valavil, Mahe, and that since both of them were very good friends he has not obtained any record from the accused to evidence the passing of consideration of Rs.50,000/-. The accused has promised to pay the principal without any interest within two months. On 6.1.1999, the accused gave a cheque for Rs.50,000/-. Ex.P.1 is the Cheque drawn by the accused in favour of the complainant. On 7.1.1999 when the cheque was presented into the Indian Bank, Mahe branch for realization but the same was bounced on 8.1.1999 on the ground that there was no funds in the account of the drawer. Ex.P.2 is the memo issued by the Indian Bank, Telicherry in this regard. On 09.01.1999, the complainant received a debit slip, Ex.P.3. Ex.P.4 is the notice dated 13.01.1999. Ex.P.5 is the postal acknowledgment for the accused having received the original of Ex.P.4. The accused has not chosen to send any replay nor made any payment.

4. P.W.2 is a Manager of Indian Bank, Mahe Branch, who would depose to the effect that P.W.1 is maintaining a savings bank account with Indian Bank, Mahe Branch and that Ex.P.1 was presented in the bank for collection and Ex.P.3 was issued by his branch and a sum of Rs.128/- was deducted for handling charges of Ex.P.1.

5. P.W.3 is the Assistant Manager of Indian Bank, Tellicherry Branch and that Ex.P.1 was supplied by their branch to the accused which contained his signature Ex.P.4 and that Ex.P.1 was received by their branch for collection, but the same was not honoured for want of funds and the returned slip for the dishonouring of Ex.P.1 is Ex.P.2 and that Ex.P.2 contains the signature of Manager Thiru.Ashok and that the account No.10161 is maintained by the accused with their bank which is still operative and Ex.C.1 is the photo stat copy and attested copy of the savings Bank ledger for the said account and Ex.C.2 is the relevant portion under Ex.C.1 by which the accused bas cash balance of Rs.3068/- when Ex.P.1 was received.

6. When the incriminating circumstances were put to the accused he denied his complicity with the crime, but would putforward a defence that he had borrowed a sum of Rs.1,00,000/- from the complainant and towards the said debt he has repaid interest to the tune of Rs.84,000/- in 14 installments at Rs.6,000/- per installment. Further he has also paid Rs.97,000/- towards the principal and that Ex.P.1 was not given for any existing debt. The accused has not adduced neither oral or documentary evidence on his side. After going through the available documents, the learned Sub-Divisional Judicial Magistrate, Mahe has come to the conclusion that the complainant has not proved the guilt of the accused

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under Section1 38 of NI Act and accordingly he dismissed the complaint. Aggrieved by the findings of the learned trial Judge, the complainant has preferred this appeal.

7. Now the point for determination in this appeal is whether the offence under Section 138 of NI Act has been made out against the accused to warrant conviction under the said provision of law?

8.The point:-

8(a) Heard Mr.Mr.C.Rajan, learned counsel for the appellant and Mr.A.V.Rajan, learned counsel for the respondent and considered their rival submissions.

8(b) The learned counsel appearing for the appellant relying on 2001(3) CTC 243 (Hiten P.Dalal Vs. Bratindranath Banerjee), contended that under Section 118 of NI Act when the accused admits his signature in a cheque (Negotiable Instrument) then the presumption will follow that it was made for consideration and that under Section 138 of NI Act if a cheque issued by a person in discharge of part or whole of liability is returned dishonoured for want of funds drawer of such cheque shall be deemed to have committed offence under Section 138 of NI Act and that under Section 139 of NI Act the presumption is to be drawn, unless contrary is proved that holder of cheque received cheque for discharge of in whole or in part of any debt or other liability. The exact observation in the above said dictum runs as follows:-

> "The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt r other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This section provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability". The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras Vs. A.Vaidyanathan Iyer AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court 'may presume" a certain state of affairs, Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the letter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The

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obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact."

Relying on the above dictum the learned counsel for the appellant would contend that the learned trial Judge has come to an erroneous conclusion that there was no subsisting debt and that to discharge the same Ex.A.1 was drawn by the accused. In the above dictum four cheques were issued by the accused drawn on the Andhra Bank in favour of the Standard Chartered Bank for the sums of Rs.27 crores, Rs.145 crores, Rs.17 crores and Rs.19,95,75,000/- respectively. Accordingly to the Bank the cheques were issued for payment of loss suffered by the Bank arising out of transactions kin securities entered into by the Bank through or at the instance of the appellant during the statutory period. So it is clear from the facts of the above said case the cheques were issued for payment of loss suffered by the Bank arising of the transactions kin securities entered into by the Bank. When those cheques were presented in the Bank all the four cheques were returned dishonored by the Andhra Bank with the remark "Not arranged for". Only under such circumstance, the above dictum has been laid, whereas in the case on hand even the notice sent under Ex.P.4 is silent with regard to the subsistence of the debt for which Ex.P.1-cheque was drawn by the accused in favour of the complainant. Except the word "discharge of your debt", there is absolutely no averment in Ex.P.4 giving details about the subsistence of the debt to which Ex.P.1-cheque dated 6.1.1999 for Rs.50,000/- was drawn.

8(c) Section 138 of the Negotiable instrument Act runs as follows:-

"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless:-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

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(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation:-For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

So the explanation to Section 138 of NI Act clearly indicates that "debt or other liability" means a legally enforceable debt or other liability. The learned counsel for the appellant would advance an argument that a legally enforceable debt means that it should not be for an illegal or immoral purposes. I am afraid that a legally enforceable debt does not mean only illegal or immoral in nature but also that it must be supported by some evidence to show that the debt was in subsistence on the date of drawal of Ex.P.1-cheque. It is pertinent to note the evidence of P.W.1 in this regard. The complainant, P.W.1, would despose that on 14.9.1998, the accused borrowed a sum of Rs.50,000/- in hundred rupees denomination in his house at Valavil, Mahe, but he would admit that he has not obtained any record for parting with the said amount and that the accused gave the cheque on 6.1.1999 for Rs.50,000/-. There is no explanation forthcoming from the complainant to the effect why he has not obtained the cheque for Rs.50,000/- on 14.9.1998 itself ie. on the date of borrowal and why the cheque-Ex.P.1 was obtained three months after the lending of money. Only in his evidence P.W.1 will depose that a sum Rs.50,000/- was borrowed by the accused on 14.9.1998. Even this date of borrowal was not mentioned in Ex.P.4-notice.

8(d) The other decision relied on by the learned counsel appearing for the appellant viz. 2002 SCC (Cri) 121 (M.M.T.C.Ltd. And another Vs. Medchl Chemicals and Pharma (P Ltd., and another), also will not be applicable to the present facts of the case because only on the basis of a memorandum of understainding dated 1.6.1994 later altered as 19.9.1994 two cheques dated 31.10.1994 and 10.11.1994 respectively were drawn by the accused in favour of the complainant, which were on presentation dishonoured on the ground of payment stopped by drawer. So in the above said dictum there was a document viz. Memorandum of understanding entered into between the parties, to show the existence of debt on the date of drawal of the cheque.

8(e) In other decision reported in 2001 AI R SCW 4344 (K.N.Beena Vs. Muniyappan) relied on by the learned counsel for the appellant, the complainant therein has proved that only in respect of a subsisting debt a cheque for Rs.63,720/- was drawn by the accused in favour of the complainant, wherein it has been held that once the complainant has proved bout the subsistence of a debt then the burden of proof shifts on the accused to prove by way of cogent evidence that there was no debt or liability. But in the case on hand there is absolutely no evidence on record to show that there was subsisting debt on the date of drawal of Ex.P.1-cheque by the accused. So, the above said dictum will not be applicable to the present facts of the case.

8(f) Per contra, the learned counsel appearing for the respondent/accused relying on 2006 (3) SCC (Cri) 30 (M.S.Narayana Menon @

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Mani Vs. State of Kerala and another), and contended that the presumption under Section 118 and 139 of NI Act as to the issuance of the said instruments for consideration and in discharge of debt is rebutable presumption and that initial burden of proof is on accused to rebut the said presumptions by raising a probable defence and if he discharges the said burden, the onus thereafter shifts on to the complainant to prove his case. In the said case a cheque was drawn by the accused in connection with share transactions. When the cheque was presented it was dishonoured. But the complainant has failed to discharge his initial burden by producing his statutory books of accounts in relation to the said transaction in question to show that there was a subsisting debt on the date of drawal of cheque. The relevant observation in the above said dicutum is as follows:-

> "The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.
>
> Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another.
>
> The second respondent was a member of a stock exchange. The transactions in relation to the stock exchange are regulated by the statutes and statutory rules. If in terms of the provisions of a statute, a member of a stock exchange is required to maintain books of accounts in a particular manner, he would be required to do so, as non-compliance with the mandatory provisions of the Rules may entail punishment. It is not in dispute that transactions comprising
>
> purchases and sales of shares by investors is a matter of confidence. Both parties would have to rely upon one another. For the said purpose, the courts of law may also take judicial notice of the practice prevailing in such business. The learned appellate Judge rightly did so.
>
> The definite case of the second respondent was that the cheque dated 17.8.1992 was issued by the appellant in discharge of his debt. The said liability by way of debt arose in terms of the transactions. For proving the said transactions, the second respondent filed books of accounts. The books of accounts maintained by the second respondent were found to be not reflecting the correct state of affairs."
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> Under such circumstances, it was held by the Honourable Apex Court that the accused cannot be convicted under Section 138 of NI Act.

The same principle has been reiterated in 1996(9) SCC 225 (Ramesh Babula Doshi Vs. State of Gujarat), 2004(10) SCC 692 (Main Pal and another Vs. State of Haryana and others), 1983 (3) SCC 629 (Ramji Surjya Padvi and Another Vs. State of Maharashtra) and 2002(6) SCC 321 (Pritam Nath and

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others Vs. State of Punjab), even though those cases have arisen under Indian Penal Code. Under such circumstances, I find no reason to interfere with the well considered judgment of the trial Court, which does not suffer from any illegality or infirmity. Point is answered accordingly.

9. In fine, the appeal is dismissed confirming the Judgment in STR.No.113/1999 on the file of the Sub-Divisional Judicial Magistrate, Mahe, Pondicherry.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Sub-Divisional Judicial Magistrate, Mahe. Pondicherry.

2. -do- Thro' The Chief Judicial Magistrate, Pondicherry.

+1 cc to Mr.A.U.ILANGO, Advocate Sr.No.7386.

+1 cc to Mr.C.Rajan, Advocate Sr.No.7032.

TEJ(CO)
dcp/14.2.07

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